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SUPREME COURT, U.S.

CASE NO. 82-859

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent,

Petitioner,

v.

JIMMY LEE CLARK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF OPPOSING PETITION FOR CERTIORARI

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ARGUMENT OPPOSING THE GRANTING OF CERTIORARI

Question I.

A.

Apart from failing to identify any listed consideration for the granting of certiorari other than what the petitioner perceives as the Sixth Circuit's penchant for not following this Court's decisions, the petitioner has ignored one of the state court's findings of fact that he is so anxious to have the federal courts honor.

From page 13 to page 16 of the petition, there appears for the first time in this litigation portions of a written decision of the trial court on the pre-trial motion to suppress evidence. This opinion was filed after the trial and it is unknown if it had been made available to either the District Court of the Sixth Circuit.

Inasmuch as the Sixth Circuit's treatment of this case and its remand relied so heavily on the absence of fact finding by the state court, 676 F. 2d at 1110, it is safe to assume that the Court below was not favored with the post-trial opinion of the trial judge. The only reference to the trial court's decision in the Court of Appeals' decision is at page 1109 where the oral ruling on the motion was made in open court. (Tr. 92).

The state court's opinion and findings of fact go a long way toward showing that the Sixth Circuit was correct even without the benefit of the trial court's ruling. Likewise, the state court opinion will go a long way toward the

resolution of this question on remand in the District Court.

The Court of Appeals below identified one example of what it then thought to be absence of fact finding. On page 1106, the Court recites the facts surrounding Clark's first contact with the Cleveland police. That contact includes the Cleveland officer advising him of Miranda rights and testifying that Clark said he did not want to talk to the police. The Cleveland police officer did not indicate that Clark asked for a lawyer but Clark's conflicting testimony at the motion to suppress hearing was that he had asked for a lawyer.

The post-trial opinion of the trial court however, includes a resolution of this conflict in favor of the defendant's version:

> "Shortly before his first confrontation with these two officers [the Willoughby officers who obtained the confession], he had been read his rights by a Cleveland Detective (sic) and had refused to answer and had demanded a lawyer, in a distinctly separate investigation."[1]

The Court of Appeals below (obviously never having seen the post-trial opinion) conceded that it could not glean from the 'silent' state court record "whether the trial court believed or disbelieved Clark's assertion that he had requested an attorney when first questioned by police." *Clark*, 676 F. 2d at 1111.

1. Opinion of state trial judge on motion to suppress at 2. Attached as Appendix.

The deference to state court findings of fact that Congress and this Court have mandated compels that it now be taken as a given that Clark asked for a lawyer when first questioned by police.

Edwards vs. Arizona, 451 U.S. 477, held that when an accused has invoked his right to have counsel present, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights". 451 U.S. at 484.

As this Court well knows, *Edwards* also forbids further interrogation until counsel has been made available. *Id.* The Sixth Circuit's recitation of the facts from the state court record demonstrates that there was interrogation following the demand for counsel. The Cleveland police officers, after having "bumped into" the Willoughby officers, returned to Clark's cell and confronted him with two matching fingerprints whereupon the first "statement" is taken. 676 F. 2d at 1107.

It is clear on these facts that the state trial court used the wrong constitutional standard in determining the admissibility of the first statement. Nowhere in the trial court's opinion is there any focus on whether Clark waived his right to counsel. *Johnson vs. Zerbst*, 304 U.S. 458 at 464.

Moreover, *Edwards* amounts to a per se rule once it is established, as here, that the accused has requested counsel, further interrogation is prohibited.

B.

The opinion of the trial court after trial on the motion to suppress shows in clear, convincing language that it applied the wrong standard to the so-called fourth statement taken at the Willoughby police station when Clark 'evinced a desire to cooperate'.

On page 5 of that opinion, the trial court concludes that because of his desire to exculpate himself and 'turn state's evidence' any resultant statement must have been voluntary.

Again leading inexorably to the conclusion that the Sixth Circuit never had the post-trial opinion of the trial court, that Court wrote at page 1111, "...the state trial court never expressly articulated what legal standard it was using,...". Quite obviously, regardless of the ramifications of the word "initiate" in *Edwards*, no separate focus was given to whether Clark was intending to 'intentionally relinquish a known right or privilege', meaning the lawyer that he had asked for no less than half a dozen times that day.

Conspicuous by its absence from any opinion in this case is reference to the police response to Clark's insistence that if he cooperated with a statement, the police would tell the judge and the county prosecutor that he cooperated.

The post-trial opinion makes reference to this arrangement and confirms that the police wrote a note indicating that the police would tell the judge and county prosecutor that Clark cooperated. (Tr. 145).

Beyond this, when the city prosecutor got to the police station before the fourth statement was made, he told

Clark that he would tell the judge and the county prosecutor that Clark had cooperated. This statement was tape recorded and is part of the record. [2]

There may be enough in the record to invoke the now oft-cited footnote 9 in *Edwards*. That test, however, still requires an examination of all of the facts to determine whether the accused knowingly and intelligently waived his right to counsel. One factor identified by the Court in footnote 9 is the initiation of the conversation by the accused and not the police. Another factor in this case might well be that the police wrote a note confirming their promise to tell the prosecutor and the judge of the defendant's "cooperation" and the city prosecutor's tape recorded promise to do the same thing and help Clark if he helped them.

In any event, the District Court on a remand, is in the perfect position to resolve these issues.

2. Salient portions of this conversation are as follows: Prosecutor Jones: "Jimmy, I can't make you any promises that you will be charged with anything other than what you are presently charged with. I understand that you would like for the prosecutor to be present so that he can tell you that he would make it known to the Court that you were cooperative, that you did cooperate with the police and you did help them in the investigation. Now I can give you my assurances that I will make the Court aware that you did this of your own free will, without any undue stress or anything of this sort being applied to you, you are free to do so. In return (?), I will speak to the Court. I will speak to the County Prosecutor and I will let them know that you were cooperative and that you expressed a desire that you wanted to help. As far as making any additional promises to you, I can't do it. I'll do what I can to help you if you help us. I mean I can say that as a person and I will do so." (This exhibit from the trial appeared at pp. 78 and 79 of the Joint Appendix in the Court below).

The petitioner's arguments all contained the appropriate "buzz words" designed to trigger a desired reaction: 'deference to state court findings of fact', 'the Court below did not comply with this Court's directives', 'judicial chaos', etc. This case raised none of those problems and is confined to the utilization of the wrong constitutional standard in determining whether Clark waived his right to counsel.

It is, in fact, the state court findings, to which we cheerfully defer, that prove the point. The petition should be denied.

Question 2.

The Sixth Circuit assumed that an erroneous jury instruction, even on an element of the crime, could be harmless error in a particular case. Therefore the outcome of *Connecticut vs. Johnson*, No. 81-927, argued October 13, 1982, will hardly affect this case.

After fully considering the instructions in their entirety, the Court below concluded that the challenged instruction here could not be harmless. 676 F. 2d at 1105. This analysis required the Court to review the facts of this case and the various portions of the instructions that dealt with culpability. The resolution of these issues hardly presents a question of national importance that will have any effects beyond this case.

The assertion of the petitioner that the balance of the jury instructions cured the error of the challenged instruction that allowed the jury to find intent to kill in either the defendant or the accomplice, is misplaced and in conflict with the trial court's view of the evidence as well as the Sixth Circuit's.

The test of *Sandstrom vs. Montana*, 442 U.S. 510, is whether a reasonable juror could have interpreted the challenged instruction in an improper manner. This jury was told:

> "It must be established in this case that at the time in question there was present in the mind of the Defendant and/or his accomplice a specific intention to cause the death of Joseph H. Bradshaw, Jr."

676 F. 2d at 1101. The District Court and the Court below

both believed that this instruction violated *Sandstrom* because it would potentially focus the jurors' attention on the culpability of the accomplice to the exclusion of Clark.

The review of the remaining instructions and the evidence led the Sixth Circuit to the conclusion that the inference that Clark had a purpose to kill was "by no means inescapable". [3]

Likewise the trial court found as a fact that: "There was no evidence presented at trial that this defendant purposely caused, incited, or encouraged the murder of Joe Bradshaw." [4]

In the face of this finding, the petitioner argues that the finding of guilty on the separate question of the specification cleanses the error. Apart from the Eighth Amendment questions implicated by the specification, it is clear that any finding of guilt on the specification was accomplished on the strength of the presumption contained in the jury instructions and in the opinion of the Ohio Supreme Court affirming Clark's conviction (*State vs. Clark*, 55 Ohio St. 2d 257), that when two people join forces for a felonious act, the purpose of one will be presumed against the other even where he was not present or was unaware what

3. When the accomplice left the gas station after the killing and joined Clark, Clark asked him "why did you shoot him?" Tr. 265. (Trial transcript).

4. Opinion of trial court in post-trial motion for acquittal contained in the appendix to Clark's original petition for certiorari, case number 78-789 in this Court. Denied at 440 U.S. 950.

his confederate was intending. This is precisely the question that was presented in Clark's petition for certiorari to the Supreme Court of Ohio on direct review, but which the Sixth Circuit here found unnecessary to decide because of the *Sandstrom* violation in the "and/or" instruction.

Regardless of the reach of the harmless error doctrine, this case is not the vehicle to utilize for review of the question since it was thoroughly considered and found inapplicable. It is far from "inescapable" that any other jury instructions here "cured" the admitted error of the offending "and/or" instruction.

CONCLUSION

The thorough and analytical treatment of this case by the Sixth Circuit has been accomplished by adhering to this Court's decisions, not by distinguishing them. Had the state courts adhered to the same decisions, we would not be here.

There is no criterion in Rule 17 of this Court's Rules that supports review by certiorari. The petition ought to be denied.

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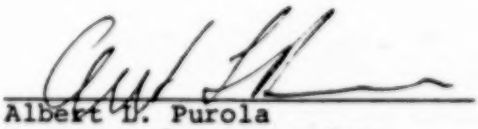
Attorney for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief in Opposition to the Petition for Certiorari have been served on petitioner, R. C. Marshall, Superintendent, by forwarding such copies through the office of his counsel, Richard David Drake, Assistant Attorney General, State Office Tower, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215, by United States Mail, postpaid, this 20th day of December, 1982.



Albert L. Purola
Attorney for Respondent.

APPENDIX

Opinion, Lake County Common Pleas Court,
State vs. Clark (unreported) respecting
Defendant's pre-trial Motion to Suppress..... A - 1

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, LAKE COUNTY

STATE OF OHIO	)	
PLAINTIFF	)	OPINION Re Defendant's Pretrial Motion to
-vs-	)	Suppress.
JIMMY LEE CLARK	)	Case No. 75-CR-435.
DEFENDANT	)	

Hon. Joseph E. O'Neill, Judge
Seventh Appellate District,
sitting by assignment in the
Court of Common Pleas, Lake
County.

Dated:

O'NEILL, J.

Initially, in disposition of this motion to suppress, the defendant has placed the Court in a precarious position. In his motion filed he has alleged four instances wherein supposedly four statements were secured from him illegally. Yet, in his testimony, the defendant denied that he made any of the alleged statements. In such a motion, the defendant is not free of burden. The United States Supreme Court in considering the suppression of illegally obtained evidence has held that there is a burden on the movant to prove to the trial court's satisfaction that illegal evidence was obtained. (See Nardone v. United States, 308 U.S. 338). If, on the one hand, defendant denies making any specific statement, how can he, on the other hand, ask that such non-existent statements be suppressed.

Clearly any statement made by defendant after his original meeting with the officers of the Willoughby Police Department would amount to continued questioning after an expression by defendant that he wished to consult an attorney absent extenuating circumstances wherein the defendant being fully aware of his rights reopened the dialogue. This right to counsel was declared by the U.S. Supreme Court in Miranda v. Arizona to be an indispensable right. Specifically any statements made by defendant at

or about 10:30 a.m., December 13, 1975, on the third floor of the Cleveland Police Department and any statements made on the same date at the scene of the alleged offense are suppressed.

This Court finds from the facts presented that on December 13, 1975, the defendant came into contact with two officers of the Willoughby Police Department, Mr. Collins and Mr. Reeves. This was not defendant's first confrontation with law enforcement. He had previous interrogatory confrontations and had on other occasions been informed of his rights under such circumstances. He was not illiterate and admittedly had progressed in school to the eleventh grade. Shortly before his first confrontation with these two officers, he had been read his rights by a Cleveland Detective and had refused to answer and had demanded a lawyer, in a distinctly separate investigation. Detective Gibbons of the Cleveland Police Department stated that at that interrogation after the usual Miranda Warning was read, the defendant was asked if he understood his rights, and he said that he did. Mr. Collins of the Willoughby Police Department read the "Miranda Warning" to defendant upon first contact. The defendant stated that he knew his rights and wanted to cooperate and did cooperate with an inculpatory statement. This factual fabric was corroborated by Detective Reeves.

These two officers both testified that when defendant was requested to reduce his oral statement to writing. Defendant demurred and said that he wished an attorney. At that point, he was returned to the detention facility. In support of his motion, defendant refers to the unpublished case of State of Ohio v. Leonard DeFazio, Case No. 614, Court of Appeals of Ohio, Eleventh District. Mr. DeFazio stated that he was willing to talk to an investigating officer because he didn't think that talking to him would be damaging. He allegedly said: "I won't sign nothing but I'll answer questions." Such a declaration is not present in this case. However, the DeFazio court relied upon State v. Jones, 37 Ohio St. 2d 21, wherein the Ohio State Supreme Court held:

> "* * * * when a defendant subsequently acts in such a way as to reasonably alert an interrogating officer that the warnings given have been misapprehended, the officer must, before any further questioning, insure that the defendant fully and correctly understands his Fifth Amendment Rights." (Pages 26-27).

The defendant in Jones willingly engaged in conversation with a detective until the detective started to take notes; at that point, Jones "refused to speak further if anything was written down." Such a point was reached in the instant case and further interrogation was

stopped. A telling portion of State v. Jones is found at page 26:

> "Although appellant's conduct at police headquarters may be susceptible to various interpretations, the record fails to negate one interpretation fatal to the state's case--that appellant misunderstood the legal effect of his speaking to Detective Powell."

Mr. Clark, the defendant, stated in testimony upon this hearing that he knew that oral statements made by him could be used against him. This admission on the record negates the interpretation that he misunderstood the legal effect of his speaking to Detectives Collins and Reeves.

At the Willoughby Police Station, the defendant evinced a desire to cooperate or to turn "State's Evidence" if there was a promise that his cooperation would be made a matter of record and passed on to the prosecutor and judge. Officer Reeves wrote a note somewhat to this effect, however, this note was destroyed. Prosecutor Pat Jones appeared at the Willoughby Police Station and read the defendant the Miranda warning and asked defendant if there was anything he wished to ask. The defendant in response asked:

> " * * * if I really tell who really did it, you understand, I mean, that means that I really get charged with the same thing still?"

In answer, Mr. Jones informed the defendant that he could make no promises. To this, the defendant responded:

> "Well really I wanted to turn State's Evidence, that's what I really wanted to do."

It is clear from the total testimony that at this point, Mr. Clark wanted to make the best deal that he possibly could. Mr. Clark testified that he clearly understood his rights after they were read by Mr. Jones. It must reasonably follow that having been given the appropriate Miranda warning and understanding it and having expressed a desire to exculpate himself, any statement given by defendant must have been voluntary. (See State v. Conley, 32 Ohio App. 2d 54, at 58).

JOSEPH E. O'NEILL
JUDGE.

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AFFIDAVIT REGARDING SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that he personally caused the documents in this case, to wit: the motion for leave to proceed in forma pauperis, the brief opposing certiorari and entry of appearance, to be deposited in the United States Mail, first class postage prepaid and addressed to the Clerk of the Supreme Court, Washington, D. C. before 6:00 p.m., E. S. T. on December 20th, 1982 at Willoughby, Ohio 44094.

Albert L. Purola
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(216) 951-2323

Attorney for Respondent.

Sworn to and signed in my presence this 20th day of December, 1982.

Notary Public

STEWART W. SAVAGE, Notary Public
My commission has no Expiration Date

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October Term, 1982

R. C. MARSHALL, Superintendent,

Petitioner,

v.

JIMMY LEE CLARK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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CASE NO. 82-859

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

R. C. MARSHALL, Superintendent,

Petitioner,

v.

JIMMY LEE CLARK,

Respondent.

Pursuant to Rule 46 of the Rules of this Court, the respondent moves this Court for leave to proceed in forma pauperis.

The respondent has been incarcerated for more than 7 years and has had no income during that time. Mr. Clark was found indigent in the Lake County, Ohio, Court of Common Pleas for the trial of the case currently under review as well as in the Ohio Court of Appeals and the Ohio Supreme Court.

Clark's petition for certiorari on direct review (denied at 440 U.S. 950), his petition for a writ of habeas corpus in the District Court and his appeal to the Sixth Circuit (676 F. 2d 1099) were all undertaken by counsel of record pro bono publico.

As this history and the attached affidavit demonstrates, he is without the necessary funds to proceed in the

Court except under Rule 46.

Albert L. Purola
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(216) 951-2323

Attorney for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Motion for Leave to Proceed in Forma Pauperis have been served on petitioner, R. C. Marshall, Superintendent, by forwarding such copies through the office of his counsel, Richard David Drake, Assistant Attorney General, State Office Tower, 30 East Broad Street, 26th Floor, Columbus, Ohio 43215, by United States Mail, postpaid, this 20th day of December, 1982.

Albert L. Purola
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-859

R. C. MARSHALL, Superintendent
Southern Ohio Correctional Facility,

Petitioner,

vs.

JIMMY LEE CLARK,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Jimmy L. Clark, being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed on appeal with being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore.

I further swear that the responses I have made to the questions relating to my ability to pay the cost of prosecuting this petition are true.

I am not presently employed and have not been since 1976. I have been incarcerated in the Southern Ohio Correctional Facility or elsewhere since December, 1975.

I have not received any income from any source during this time.

I do not have any savings nor do I own any property, either real or personal.

Jimmy Lee Clark
JIMMY LEE CLARK

Sworn and subscribed to before me this 26 day of November, 1982.

Jerald E. Flaugher
Notary Public
JERALD E. FLAUGHER
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES JULY 4, 1983